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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

ROSS DOUGLAS RING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the court's denial of recross-examination and the prosecutor's summation were improper.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of having conspired to import a Schedule II controlled substance (cocaine), in violation of 21 U.S.C. 841(a)(1) and 952(a). He was sentenced to a term of four years' imprisonment. The court of appeals summarily affirmed (Pet. App. A; 491 F. 2d 1271) and denied rehearing (Pet. App. B).

The evidence showed that on December 2, 1972, petitioner and Michele Rubio[1/] left Miami, Florida, for Barranquilla, Colombia (Tr. 17, 18).[2/] Rubio, who testified as a government witness,

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1/ Rubio had been jointly indicted with petitioner for having conspired to import cocaine (Count I); additionally she was charged with importation of a narcotic substance (Count II) and possession with intent to distribute (Count III). Following petitioner's trial, Rubio pleaded guilty to Count I, and Counts II and III were dismissed.

2/ "Tr." refers to the one-volume trial transcript.

stated that petitioner had planned and financed the trip for the purpose of purchasing cocaine (Tr. 17). Petitioner had promised to pay Rubio "between $500 and $1,000" for her participation in the scheme. Rubio further testified that, after the cocaine was delivered to their room, they concealed it on her person and boarded a plane for the return flight to Miami (Tr. 19-20).

While petitioner and Rubio were having their baggage inspected, a customs officer became suspicious of Rubio's bulky appearance and requested that she submit to a secondary examination (Tr. 44). The subsequent examination disclosed that she had concealed under her clothes eight plastic bags containing four and one-half pounds of cocaine (Tr. 49-50, 53).

1. Petitioner's claim that the trial court erred in denying him the opportunity to conduct recross-examination of customs agent Morphis is without merit.

Agent Morphis testified on direct-examination that he had taken custody of and weighed the contraband following the search of Rubio (Tr. 53-54). On cross-examination, the agent stated that he had assisted the processing of Rubio (Tr. 55), that she had made statements at that time (Tr. 56) and that they had been recorded by agent Keller. Petitioner's counsel questioned Morphis extensively about certain of these statements, particularly emphasizing the fact that Rubio told the agents that the cocaine had been delivered to the hotel by a man who spoke only Spanish (Tr. 56-60). During the brief redirect-examination, Morphis

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Petitioner argues that agent Morphis' statement on redirect "was new matter * * * of a vital nature going to guilty knowledge and the essence of the charge of conspiracy* * *" (Pet. 4). However, petitioner himself prompted the redirect testimony by probing the contents of Rubio's statements on cross-examination of agent Morphis. Indeed, petitioner must have known that he would evoke such redirect testimony since his cross-examination of agent Morphis was based upon a "facsimile" of Rubio's recorded statements (Tr. 57) respecting her and petitioner's involvement in the narcotics transaction (Tr. 57). In these circumstances, the redirect testimony was not a "new matter" and the trial court's denial of recross-examination did not prejudice petitioner or constitute reversible error. Cf. United States v. Kenny, 462 F. 2d 1205, 1226 (C.A. 3), certiorari denied, 409 U.S. 914. In any event, petitioner later had ample opportunity to question agent Keller, who recorded Rubio's statement about petitioner's knowledge--and petitioner chose not to pursue the matter (Tr. 69-71).

2. Petitioner also challenges the propriety of a portion of the prosecution's summation, claiming that it impermissibly buttressed the credibility of Rubio. This contention is without substance.

Rubio testified on cross-examination that she had pled guilty to Count II of the three-count indictment against her, that she intended to change her plea and to plead guilty to Count I

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2. Petitioner also challenges the propriety of a portion of the prosecution's summation, claiming that it impermissibly buttressed the credibility of Rubio. This contention is without substance.

Rubio testified on cross-examination that she had pled guilty to Count II of the three-count indictment against her, that she intended to change her plea and to plead guilty to Count I instead, and that she had been offered no promises of leniency in exchange for her testimony (Tr. 36-38). She was not asked about the disposition of the other two counts. In his summation, petitioner's counsel stated (Tr. 128, 130-131):

> I asked Miss Rubio did she expect any leniency. She said, "No, I don't expect any leniency." However you know that Miss Rubio was charged with three counts in this indictment: Conspiracy, importation and possession; but yet miraculously

> two of these counts have been dropped. Does that create a reasonable doubt as to what she hopes to gain by this? This has never been explained to you.
>
> * * * *
>
> Ask Mrs. Anderson [the prosecutor] to explain to you why two counts of this three-count indictment against Miss Rubio were dropped.

During rebuttal argument, the prosecutor responded to the comments of petitioner's counsel (Tr. 135):

> Now finally he said you should ask me why were two counts of the indictment against Miss Rubio dropped. Ladies and gentlemen, two counts of the indictment against Miss Rubio have not been dropped.

There was no evidence that any counts had been dismissed and the court records confirm that no counts had been dismissed at the time of trial.[3/] Accordingly, the statement of the prosecutor in response to defense counsel's invitation of an explanation why (as he stated without factual basis) two counts had been dropped, was a literally accurate summary of the evidence of record.[4/] While it might have been the better course to call the misstatement of petitioner's counsel to the attention of the court and ask for an appropriate corrective statement, neither the prosecutor's response in the course of closing argument, nor the court's denials of petitioner's request for a mistrial or

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3/ The trial took place on June 18, 1973. The court records show that one month prior to the trial, pursuant to local practice, Rubio signed a petition to plead guilty to Count I of the three-count indictment. On July 11, 1973, almost a month after the trial, her guilty plea to Count I was accepted by the court, and she was sentenced under the Youth Corrections Act, and on July 18, 1973, the remaining counts were dismissed.

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4/ According to the records of the United States Attorney's Office (the prosecutor who handled this case is no longer associated with the United States Attorney's Office), it appears that the prosecutor had agreed prior to the trial that if Rubio pled guilty to one count of the indictment the other two would be dismissed by the government. As the existence of such an agreement, its terms, and Rubio's knowledge of it, cannot be determined on the record before this Court, there is presently no occasion for the Court to consider whether the prosecutor failed to make any required disclosures. Cf. Giglio v. United States, 405 U.S. 150. Such an issue should be (footnote continued)

for additional time to respond,[5] constituted reversible error.[6] Cf. Donnelly v. De Christoforo, No. 72-1570, decided May 13, 1974, slip op. pp. 9-10.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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4/ (continued) initially considered by the district court on a factual record developed in connection with an appropriate post-trial motion.

5/ The court had instructed the jury that the "statements and arguments of counsel are not evidence" (Tr. 10) and that they should decide solely on the basis of the evidence (Tr. 9, 12, 139). Petitioner's counsel sought no further instruction on this matter.

6/ Petitioner's reliance (Pet. 14-15) upon United States v. Spangelet, 258 F. 2d 338 (C.A. 2), is misplaced. There the prosecutor stated, in response to a justifiable inference that there may have been a "deal" concerning reduction of bail for

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